167-467

# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. ~~631~~. 282

JOHN D. WARNER, APPELLANT,

*vs.*

THE CITY OF NEW ORLEANS.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

FILED MAY 27, 1895.

(15,920.)

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INDEX.


| | Original. | Print. |
|---|---|---|
| Caption | 1 | 1 |
| Order to certify questions | 1 | 2 |
| Statement | 2 | 2 |
| Questions certified | 5 | 5 |
| Clerk's certificate | 6 | 10 |

1 United States of America, Fifth Judicial Circuit.

Be it remembered that on this 14th day of May, 1895, the same being a day of the November term of 1894 of the United States circuit court of appeals for the fifth circuit, begun and held in the city of New Orleans, State of Louisiana, there being present the Hon. Don A. Pardee and the Hon. A. P. McCormick, United States circuit judges for the fifth judicial circuit, and the Hon. John Bruce, United States district judge for the northern district of Alabama, when the following proceedings were had:

JOHN D. WARNER, Appellant,
*v.*
THE CITY OF NEW ORLEANS, Appellee. } No. 364.

Appeal from the circuit court of the United States, eastern district of Louisiana.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the eastern district of Louisiana and was argued by counsel.

2 Whereupon, the court desiring the instruction of the honorable the Supreme Court of the United States for the proper decision of the questions arising herein,—

It is ordered that the following statement and questions of law be certified to said Supreme Court, to wit:

The complainant, a citizen of the State of New York, filed his bill in said circuit court against the city of New Orleans, alleging substantially as follows:

By act approved March 18, 1858, the legislature of the State of Louisiana undertook to provide for draining and reclaiming portions of the parishes of Orleans and Jefferson. The work was to be accomplished through boards of drainage commissioners appointed for each of the three districts into which the territory was divided.

The funds to pay for work were to be raised as follows: Whenever the several boards were prepared to drain their districts they were required to cause a plan to be made of the proposed work, designating its subdivisions and the names of the proprietors of the land, &c. This plan was to be filed in the mortgage office, of which notice was required to be published once a week for four consecutive weeks. At the expiration of the notice the boards were to apply to a court specified in the act, which was required to decree that the district was subject to a first-mortgage lien and privilege for such an amount as might be assessed upon the property. After the tax had been levied the court was authorized to render judgment against the several property-owners for the amount due by them.

3 By another act, approved March 17, 1859, the boards were authorized to issue bonds to the extent of $300,000 for each

district for the purpose of carrying on the work, redeemable out of drainage taxes.

By an act approved March 1, 1861, the boards were authorized to apportion the amount which each tax-payer should be required to pay yearly to meet the annual interest and instalments due on the bonds. Other and more stringent provisions for the collection of these taxes were also made in the act, such as authorizing judgments to be rendered against the tax-payer and his property and the issuance of execution as in ordinary cases. The boards of commissioners for the first and second districts filed plans of the work they proposed to do, and obtained judgments decreeing the lands in those districts to be subject to liens and privileges for the proposed work; they levied assessments payable in instalments and obtained judgments for the amount of the rolls, and some money was collected thereon.

By act 30 of 1871 the several boards of drainage commissioners were abolished and the work of drainage was transferred to the Mississippi and Mexican Gulf Ship Canal Company, but the board of administrators of the city of New Orleans for all other purposes was made their successor, and was subrogated to all moneys, assessments, and other assets then belonging to them, and was required to collect such tax and assessments and to make and collect an additional tax of two mills per superficial foot on all lands where no tax had been levied for drainage purposes, and that all collections from these sources be placed to the credit of said Mississippi
4 and Mexican Gulf Ship Canal Company and held as a fund to be applied only to the drainage of the city of New Orleans and Carrollton.

By the 8th section of the act it was made the duty of the administrator of accounts to draw a warrant on the administrator of finance against this fund for the payment of amounts due for all work done by that company.

The board of administrators entered on the duties imposed on them under this act, procured the mortgages and liens to be decreed, assessments to be levied, and judgments to be rendered for the taxes assessed in the third and fourth drainage districts.

The whole amount of assessments that came under their administration was $1,699,637.37, and of this $1,003,342.28 was assessed against individuals and $696,394.30 against the city of New Orleans on the area of her streets and squares.

The work was continued under this act until 1876 by Warner Van Norden, who had become transferree of the said Mississippi and Mexican Gulf Ship Canal Company. He excavated some 5,000,000 cubic yards of earth and completed two-thirds of the plan of drainage, when act No. 16, of February 24, 1876, was passed for the purpose of authorizing the city of New Orleans to assume exclusive control of all drainage work, and, if she desired it or deemed it advisable, to purchase from said canal company and its transferree Van Norden, all the tools, boats, and apparatus appertaining to drainage work and the franchise of the company, upon an appraisement to be made by appraisers to be appointed by the city council. The

act further provided that the price should be paid by the city of New Orleans in drainage warrants in the same form and manner as those theretofore issued under act 30 of 1871.

5 Pursuant to this act the city council caused the property to be appraised. The valuation was fixed at $300,000.00, and on the 7th of June, 1876, a formal act of sale and transfer was executed between Warner Van Norden and said canal company and said city of New Orleans, by which the former made a transfer of the drainage plant and franchise for said amount, payable in drainage warrants, and the city covenanted "not to obstruct or impede, but, on the contrary, to facilitate, by all lawful means, the collection of drainage assessments, as provided by law, until said warrants have been fully paid, it being well understood and agreed by and between said parties thereto that collection of drainage-tax assessments should not be diverted from the liquidation of said warrants and expenses under any pretext whatsoever until the full and final payment of the same."

Up to the date of this sale the city had collected on the assessments against private property $229,922.89, leaving $1,469,714.47 outstanding and uncollected, of which amount the city owed $696,394.30 as assessed of the streets and squares. The drainage warrants issued prior to December 31, 1874, had been paid or taken up before said sale by the issue of bonds of the "drainage series" to the amount of $1,672,105.21 under authority of act 73, approved April 26, 1872. The 13th section of this act, after providing for the issue of said bonds, further provided that "all taxes collected for drainage and not required for payment of drainage warrants shall be devoted to the purchase from the lowest bidder of bonds issued for drainage."

Complainant sues on three of the drainage warrants, of $2,000.00 each, given for the purchase price of the drainage plant and franchise sold to the city of New Orleans as above set forth. The

6 bill, after setting out the foregoing state of facts in more amplified form, avers: (1.) That the city of New Orleans, after she became possessed of the drainage franchise, sold some of the drainage machinery and suffered the rest to become rotten and valueless and abandoned all work of drainage; that by reason of the non-completion of the drainage system the supreme court of Louisiana decided the drainage taxes could not be collected, inasmuch as no benefit had been conferred on the property. (2.) That the city by various means impeded the collection of drainage taxes, and by her conduct, ordinances, and proclamations encouraged and induced people to refuse to pay the assessments, by reason whereof the drainage assessments due by private persons have become valueless. (3.) That the city will plead that she has been discharged from all liability to account for the drainage taxes she has collected, or which she ought to have collected but has wasted, as well as her own indebtedness, by the issuance and delivery, between May 10, 1872, and December 31, 1874, of drainage bonds under authority of the act 73 of 1872. (4.) That the city had never claimed, prior to the purchase of said property and franchise, that the issuance of

said bonds operated as such discharge, and made no such plea, save in the case of James W. Peake *vs.* The City of New Orleans, filed March 19, 1888. (5.) That the act of 1876 was an authority for the city to make said purchase, as well as a legislative recognition that said drainage fund had not been discharged by the issue of said bonds, and was an appropriation and dedication of so much thereof as was necessary to pay the purchase warrants without offset or impairment. (6.) That the contract of sale was entered into by Van Norden in consideration of the provisions of said act of 1876 and its effects on his rights and remedies; that neither at the
7 time of entering into the contract of sale nor when the warrants were delivered in discharge of the price did the city disclose to him that she would claim the issuance of said bonds as a discharge of her liability to account for and apply the drainage taxes, including those due by herself, to the payment of said purchase warrants; that he was ignorant that the city would claim such discharge, and would not have entered into said contract if he had been advised that any such claim would be made as aforesaid; that Van Norden has expressly and by a writing annexed to and made part of the bill subrogated complainant to all his rights and remedies growing out of said sale (R., p. 145); the complainant therefore avers that the city is estopped in equity and good conscience from pleading or maintaining such defense.

The bill closes with a prayer for an accounting of said drainage fund, and especially that the amount due by the city as assessee of the streets and squares be decreed to be a trust fund in the hands of the city applicable to the payment of said drainage warrants.

Defendant demurred to the bill, especially asserting that the decision in the case of James W. Peake *vs.* The City of New Orleans, reported in 139 U. S., 342, is decisive of the issues in this case. The demurrer having been sustained by the circuit court, the complainant has removed the case to this court for review, assigning, among others, error in this respect.

And it appearing that the suit of said Peake was based on drainage warrants given for work, all dated July 9, 1875, complainant insists that they were issued while the city was an involuntary and non-contractual trustee, and in this respect differ from those
8 involved in this case, which were issued by the city as a voluntary and contractual trustee under the permissive authority of the legislature, and that both on principle and owing to the estoppel pleaded in the bill his rights are not affected by said decision.

The case having been argued in this court on the errors assigned and this court desiring the instruction of the honorable the Supreme Court for the proper decision of the questions arising herein touching the matter of estoppel aforesaid and the application of the decision of the Supreme Court to the issues involved in this suit, it is ordered that the following questions and propositions of law be certified to the Supreme Court in accordance with the provisions of section 6 of the act entitled "An act to establish circuit courts of appeal and define and regulate in certain cases the jurisdiction of

the courts of the United States, and for other purposes," approved March 3, 1891, to wit:

First.

Is the city of New Orleans under the warranties, express and implied, contained in the contract of sale of June 7, 1876, by which she acquired the property and franchise from Warner Van Norden, and under the averments of the bill, estopped from pleading against the complainant the issuance of bonds to retire $1,672,105.21 of drainage warrants, issued prior to said sale, as a discharge of her obligation to account for drainage funds collected on private property and as a discharge from her own liability to that fund as assessee of the streets and squares?

Second.

Should the decision in the case of James W. Peake *vs.* The
9 City of New Orleans, 139 U. S., p. 342, be held to apply to the facts of this case and operate to defeat the complainant's action?

It is further ordered that a copy of the printed record and the several acts of the legislature, together with copies of the briefs on file in this court, be sent to the honorable the Supreme Court with the transcript certifying the aforesaid questions.

10 I, James M. McKee, clerk of the United States circuit court of appeals, fifth circuit, do hereby certify that the foregoing nine pages constitute a true, full, and perfect transcript of the statement and questions of law certified to the Supreme Court of the United States by the said United States circuit court of appeals for the fifth circuit in the cause of John D. Warner *v.* The City of New Orleans, No. 364, as fully and completely as the same remains on record in my office.

Seal United States Circuit Court of Appeals, Fifth Circuit.

Given under my hand and the seal of said court, at the city of New Orleans, this 15th day of May, 1895.

JAMES M. McKEE, *Clerk.*

Endorsed on cover: Case No. 15,920. U. S. circuit court of appeals, fifth circuit. Term No., 631. John D. Warner, appellant, *vs.* The City of New Orleans. (Certificate.) Filed May 27th, 1895.

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Seal United States Circuit Court of Appeals, Fifth Circuit.

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JAMES M. McKEE, *Clerk.*

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